and Madeline Manuior.

Troyer has never been convicted of any criminal conduct. In 1982, the United States made a charge against Tate Troyer, then it subsequently dismissed the charge. However, despite the passage of time, the record of the charge has been maintained by the FBI in the NCIC database.

Twenty-one years later, in 2003, Tate Troyer was working for Boomtown Casino. Upon information and belief, Boomtown had a practice of illegally purchasing NCIC information from various individuals. In April of 2003, Boomtown hired a St. Charles Parish deputy to access the NCIC record of Troyer. Accordingly, without authority or legitimate purpose, a St. Charles Parish Sheriff's deputy, who happens to be the head of Internal Affairs, Michael Manuior, lied to the FBI and wrongfully used his position as an officer to obtain the NCIC record of plaintiff, Troyer. After obtaining the NCIC record of Troyer, Manuior publicized the contents of the report by forwarding the NCIC record to Troyer's employer, Boomtown Casino. Madeline Manuior, the officer's wife, was a subordinate to Troyer at the relevant time, and she was making efforts to have Troyer fired so that she could replace him for a substantially higher salary.

Troyer's position in this case is that Boomtown, Manuior and the various defendant-actors violated his constitutional right to privacy by illegally obtaining possession of his NCIC record, then illegally publicizing the information contained therein. Information in an NCIC report can effect a person's ability to obtain a job, obtain a license, pursue an education or pursue other interests. Those facts contained in an NCIC report are personal and intimate. Wrongful seizure and publication of non-conviction information on an NCIC report is a violation of an individual's right to privacy and gives rise to a claim under

42 USC § 1983. The federal courts have federal question jurisdiction.

Also important to note is that the plaintiff suffered from depression and a stroke as a result of the misconduct of the defendants. Troyer is permanently paralyzed at age 42.

This is an appeal from the United States Fifth Circuit Court of Appeals. Jurisdiction is invoked under Rule 10(c). The Fifth Circuit has decided as important question of federal law that has not been , but should be decided by this Court.

ARGUMENT WITH REASONS TO ACCEPT WRIT

In this case, the age of high technology computers converges with the American citizen's demand for privacy. Can a police officer indiscriminately publish a nonconvicted person's background records for profit? This is a case of first impression. The petitioners, Cindy and Tate Troyer, request that writs be granted to address the malfeasance which has occurred in this case.

This Court should not and must not condone illegal conduct of a police officer. First, the officer lies to the FBI using false pretenses to gain access to the NCIC database, breaching a prior written agreement. Then, the officer illegally gains access and possession of confidential government documents. Then, in the ultimate breach of trust, he publishes the secret information to the victim's employer. The victim is terminated. Subsequently, it is discovered that the officer and his wife stood to gain economically for the illegal conduct. This Court is the only opportunity for redress for the victim. NCIC records contain confidential information. Particularly, as in this case, twenty-year old, non-conviction information contained in an NCIC report is

extremely personal and can directly effect a person's livelihood. Publication of such information can, and did, effect a person's ability to work, enjoy leisure activities by obtaining licenses, effect a person's ability to be accepted into an institution of higher education, and various other activities. Further, the information can be embarrassing to a law-abiding citizen who has had no encounter with law enforcement other than the old incident, where there was no conviction. Consequently, the illegal accessing of the NCIC report for the purpose of embarrassing and hurting the individual before his employer and his peers is a violation of a person's right to privacy.

Procedural History

On August 5, 2004, defendants, Boomtown, Robertson, Jones, and Madeline Manuior, filed a 12(b)(6) Motion to Dismiss asserting that there was no constitutional violation alleged by the plaintiff sufficient to establish a federal claim. A hearing and oral arguments were had on September 29, 2004. Subsequent thereto, on September 30, 2004, after filing an Answer, the defendants, Greg Champagne and Michael Manuior, filed a Motion to Adopt and Incorporated Memorandum In Support asserting the arguments of Boomtown.. Finally, after filing an Answer and Affirmative Defenses, Paul Connick and Terry Richard moved for dismissal on the basis asserted by the Boomtown defendants.

On January 12, 2005, the trial court rendered a Judgment dismissing the federal claims of plaintiffs, with prejudice, as to all parties. The trial court dismissed the state law claims without prejudice. The Fifth Circuit affirmed.

ISSUE ONE RESTATED:

DOES 42 U.S.C. §1983 CREATE A CAUSE OF ACTION WHEN A POLICE OFFICER STEALS "NON-CONVICTION" INFORMATION FROM THE DATABASE OF THE NATIONAL CRIME INFORMATION CENTER AND PUBLISHES THAT INFORMATION TO THIRD PARTIES FOR NO LEGITIMATE PURPOSE?

The enumerated rights to privacy are found in U.S. Const. Amends. I, II, IV, and V.[1]

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness... They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. **They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred , as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.**

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[1] The right to associate includes the right to anonymity. ***NAACP v. Alabama***, 357 U.S. 449 (1958).

Olmstead, et al v. United States, 277 U.S. 438, 478 (1928) (emphasis added).

The Supreme Court has increased the privacy protections over the past fifty years in light of the increase in technology and the use of computers. In ***Roe v. Wade***, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court expressly recognized the existence of the right to privacy, but left its scope undefined.

In ***Whalen v. Roe***, the Supreme Court expressly recognized that the constitutional right to privacy encompasses an "individual interest in avoiding disclosure of personal matters." 429 U.S. 589, 599, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1977). "[T]he right to privacy consists of two interrelated strands: One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." ***Fadjo v. Coon***, 633 F.2d 1172, 1175 (5th Cir. 1981) (*citing* ***Whalen***, *infra*). The first strand, described as the "right to confidentiality," is broader than the second. Id. (citing ***Plante v. Gonzales***, 575 F.2d 1119, 1132 (5th Cir. 1978), *cert denied*, 439 U.S. 1129, 99 S.Ct. 1047, 59 L.Ed.2d 90 (1979). Matters falling outside the scope of decisionmaking may implicate the individual's interest in non-disclosure or confidentiality. Id.

Troyer has alleged civil rights claims which include 42 U.S.C. §§ 1983 and 1985. Section 1983 provides a private right of action against parties acting "under color of any statute, ordinance, regulation, custom, or usage, of any State to redress the deprivation of rights secured by the United States Constitution or federal law." ***Bauer v. Texas***, 341 F.3d 352, 357 (5th Cir. 2003) (citing ***City of St. Louis v.***

Praprotnik, 485 U.S. 112 (1988)).[2]

No case has ever addressed the issue of whether the illegitimate, indiscriminate dissemination of a twenty-year old, non-conviction, indictment, of a co-defendant, not easily accessible to the public, and only available in the NCIC database, invokes constitutional protection where the individual loses his job and suffers permanent disability. In ***Tosh v. Buddies Supermarkets***, the Fifth Circuit refused to address the issue presented here. 482 F.2d 329, 332 (5th Cir. 1973). "Whether this yet embryonic constitutional right restricts the indiscriminate release of arrest records to the merely curious is a question we need not and do not decide in this case." Id.

A. The trial court erred in finding that an NCIC report containing twenty year old, non-conviction information does not contain "intimate" facts.

1. Chilling Effects:

The non-conviction information in an NCIC report could have a devastating effect, not just on Troyer but, on anyone similarly situated. Because a "criminal record"

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[2] The defendants neither allege any type of immunity, nor do they dispute that Troyer is a United States citizen. Likewise, the defendants do not dispute that there was state action in this case. The defendants only argue that there was no Constitutional right violated.

"violates his dignity as a human being"[3] and can have a "chilling effect" on an individual's liberty interest to pursue employment[4] and first amendment right to speak freely[5], a nonconviction, criminal history, must invoke the right of that individual to keep that information private and must be considered fundamental and those facts intimate. In the words of J.Edgar Hoover, Director of the F.B.I.: **"In the hands of an inexperienced person who is unfamiliar with its purpose, an F.B.I. report can be a dangerous instrument of injustice."** 46 N. Dame L. 827,803 (1971) (R.110). And whether or not the information is disclosed, the fear of the subject person that it will be or may be [disseminated] is always there." ***United States v. Dooley***, 364 F. Supp. 75, 79 (E.D.Penn. 9/28/73).

2. Substantial Privacy Interest:

In ***United States Department of Justice v. Reporters Committee for Freedom of the Press***, the United State Supreme Court ruled that **"[t]he privacy interest in a rap sheet is substantial."** 489 U.S. 749, 770 (1989). The Supreme Court rejected the contention that an individual does not have a privacy interest in F.B.I. maintained criminal history records simply because it was public at one time.

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[3] ***United States v. Kalish***, 271 F.Supp. 968, 970 (U.S. D.P.R. 1967).

[4] ***Menard v. U.S.***, 430 F.2d 486, 490 (D.C.App. 1970).

[5] *Right of Police to Retain Arrest Records*, 49 N.C.L. Rev. 509, 516 (1971) (R.99).

Important points made by the Supreme Court are:

> The very fact that federal funds are spent to prepare, index and maintain these criminal history files demonstrates... the information is not otherwise freely available. Id. at 764.
>
> [T]here is a vast difference between the public records that might be found after a diligent search of courthouse files,...and a computerized summary located in a single clearinghouse of information. Id.
>
> This conclusion is supported by the web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information. Id.[6]
>
> This careful and limited pattern of authorized rap-sheet disclosure fits the dictionary definition of privacy as involving a restriction of information 'to the use of a particular person or class of persons.' Id.
>
> Also supporting our conclusion that a strong privacy

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[6] The FBI's NCIC records may be accessed for only three legitimate purposes: criminal justice; justice employment; and security clearance.

> interest inheres in the nondisclosure of compiled computerized information is the Privacy Act of 1974. Id. at 766.
>
> Given this level of federal concern over centralized data bases, the fact that most States deny the general public access to their criminal-history summaries should not be surprising. Id.[7]
>
> The difference between scattered bits of criminal history and a federal compilation, federal statutory provisions, and state policies, our cases have also recognized the privacy interest inherent in the nondisclosure of certain information even where the information may have been at one time public. Id. (*citing* ***Department of Air Force v. Rose***, 425 U.S. 352 (1976)).
>
> We have also recognized the privacy interest in keeping personal facts away from the public eye." Id. at 769 (citing ***Whalen v. Roe***, 429 U.S. 589 (1977)).

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[7] In Louisiana, criminal history is not public record, and not to be disclosed except for law enforcement purposes. See ***Ellerbe v. Andrews***; 92-1376 (La.App.1st Cir. 7/2/93); 623 So.2d 41, 42-44.

> In sum, the fact that 'an event is not wholly 'private' does not mean that an individual has no interest in limiting disclosure or dissemination of the information.Id. at 769-770 (citing Renquist, *Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement?*, Nelson Timothy Stephens Lectures, University of Kansas Law School, pt.1, p. 13 (Sept. 26-27, 1974).
>
> Accordingly, we hold as a categorical matter that a third party's request for law enforcement records or information about a private citizen can reasonably be expected to invade that citizen's privacy, and that when that request seeks no 'official information' about Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted. Id. at 780.

3. The trial court made an improper analysis relying on cases involving "criminal" conduct, without intimate facts:

In addressing the issue of whether Troyer has a constitutional right of privacy in his NCIC report, the trial

court erroneously discussed cases involving "criminal" conduct. Troyer has no record of "criminal" conduct. The FBI maintains a record of charging him and dismissing the charges.

In ***Cline v. Rogers***, the court examined the limited issue of whether a convicted criminal had a "right to privacy" in his "criminal" records. 87 F.3d 176 (6th Cir. 1996). With very little, if any analysis, the court cited ***Paul v. Davis***, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), for the proposition that criminal records are not a personal matter. "Moreover, one's criminal history is arguably not a private "personal matter" at all, since arrest and conviction information are a matter of public record." Id. (emphasis added). Troyer has no conviction.

In ***Cline***, 87 F.3d at 179, the Sixth Circuit expressly **rejected** the Fifth Circuit's rulings: "although there may be a dispute among the circuit courts regarding the existence and extent of an individual privacy right to nondisclosure of 'personal matters,' see ***Slayton v. Willingham***, 726 F.2d 631 (10th Cir. 1984); ***Fadjo v. Coon***, 633 F.2d 1172, 1176 (5th Cir. Unit B 1981) (both opining that ***Paul*** has been at least partially overruled by the Supreme Court's decisions in ***Whalen*** and ***Nixon***), this circuit does not recognize a constitutional privacy interest in avoiding disclosure of, e.g., one's criminal record."[8]

At least two other courts have addressed the issue of whether an individual has a privacy interest in criminal conviction records. See ***Nilson v. Layton City***, 45 F.3d 369,

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[8] Also see ***Polchowski v. Gorris***, the court did not address the constitutional "right to privacy" issue. It strictly looked at whether a private right of action existed under 42 U.S.C. §§ 3789g(a) and (b).

372 (10th Cir. 1995)(finding that a person convicted of a crime has no expectation of privacy because enacted law places a citizen on notice that a violation of the law is not private)[9]; ***Eagle v. Morgan***, 88 F.3 620, 625 (8th Cir. 1996) (finding that criminal activity, despite expungement, is not private)[10]. No case has addressed whether a person **who has never been convicted** has an expectation of privacy. Further, even if Troyer was convicted, the other circuits are in disagreement with the Fifth Circuit.

In all of the cases cited by the defendants and the trial court, the various courts ruled that "criminal" conduct was not protected. The key word being "criminal." There is no allegation or indication that Troyer committed any "criminal" conduct. He has the right to expect that if the FBI is going to maintain a record of a charge, that the record will be kept undisclosed to third parties.

Further, the trial court's comparison of the instant case to ***Zaffuto v. City of Hammond***, 308 F.3d 485 (5th Cir. 2002), is misplaced. In ***Zaffuto***, the information published by the defendants was not intimate. "The Court concluded that the 'substance' of the Zaffuto's conversation revealed only that 'Zaffuto disliked some of his bosses," and the disclosure in this case, though deliberate, did not reveal the type of intimate facts to constitute a constitutional violation." (R.35)(Citing ***Zaffuto***, 308 F.3d at 490-91). One can

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[9] Also, in ***Nilson***, the plaintiff was convicted, was a public official and "public person under the law, the defendant was the press. Further, expungement does not private a criminal act.

[10] The ***Eagle*** court commented that a guilty plea is by its very nature public.

understand that such information is not private. Everyone at some point makes a disparaging comment about his superiors. On the contrary, Troyer's career, reputation and livelihood were at stake. After the passage of twenty years, he expected that report would be kept confidential and used only for legitimate purposes.

"The retention by police of an individual's arrest record was considered a humiliation to which he must submit for the benefit of society." 46 N. Dame L. 827 (1971) (citing ***Fernicola v. Keenan***, 136 N.J.Eq. 9, 10, 39 A.2d 851 (1944)). Previously held to be constitutional, courts have consistently acknowledged that maintaining records of those **not convicted** is a "necessary intrusion" upon an individual's right to privacy. This authority of the government gives law enforcement agencies the resources to keep track of individuals in an ever moving society.

Courts across the Country have consistently recognized a distinction between records of those who have been arrested with convictions and those who have no conviction. See *Right of Police to Retain Arrest Records*, 49 N.C.L. Rev. 509, 510-514 (1971); and *The F.B.I.'s Right to Retain and Disseminate Arrest Records of Persons Not Convicted of a Crime May Be Limited by the First and Fifth Amendments*, 46 N.DameLaw 825 (1971). (Attached hereto).

The challenge of the courts has been the balance of a person's right to privacy versus the government's interest in maintaining criminal histories all of people arrested. "[T]he retention by police of an innocent individual's arrest record creates a stigma which can directly bear on the functions which that person can perform." Id.

> Information denominated in a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no

> direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved.

Menard v. Mitchell, 430 F.2d 486, 490 (D.C.App. 1970).

In the case at hand, because Troyer was never convicted of a crime, he had a constitutional right to expect that the records would remain confidential.

Since its inception, courts have battled with the task of balancing a person's privacy interest against the government's authority to maintain non-conviction records. The courts have always expressed concerns that employers might gain access to **non-conviction** information and not hire, or terminate, a person based upon that information alone. In fact, the Supreme Court has indicated that an employer has no right to FBI maintained criminal history. ***United States Department of Justice v. Reporters Committee for Freedom of the Press***, 489 U.S. 749, 771 (1989).

In this Country, a person is innocent unless proven guilty. It follows that a person not proven guilty is innocent. To categorize innocent, but indicted, people with convicted individuals, creates an inappropriate classification in which

the innocent will not be provided equal protection under the laws. "Yet it is clear that the government may not, wittingly or unwittingly, engage in wanton defamation of individuals and groups, and there is a limit beyond which the government may not tread in devising classifications that lump the innocent with the guilty." ***Menard v. Mitchell***, 430 F.2d 486, 492(D.C.App. 1970) (citing ***Watkins v. United States***, 354 U.S. 178, 187 (1967); ***Joint Anti-Fascist Refugee Committee v. McGrath***, 341 U.S. 123, 153 (1951); and ***Boorda v. Subversive Activities Control Board***, 421 F.2d 1142 (1969), cert denied, 397 U.S. 1042 (1970). "Therefore, in weighing the public interest in disclosure, we must weigh a different quantity: since innocent members may easily be separated from guilty ones, the public interest in exposure of the guilty cannot be used to justify exposure of the innocent." ***Boorda***, 421 F.2d at 1149.

In ***United States v. Dooley***, 364 F. Supp. 75, 77, (E.D.Penn. 9/28/73), the Court recognized that the retention of an indictment **without a conviction** served no legitimate purpose. Even "authorized" release of this information has no law enforcement value since the case was resolved by acquittal. Id. The simple retention of arrest and indictment records may advance a compelling government interest of law enforcement which outweighs the individual's right to privacy. However, the violation of the constitutional right to privacy will exist if the indictment information is indiscriminately disseminated.

> Even assuming that the adverse information never falls into "unauthorized hands," the fact remains (1) that the information is valueless if its retention is based upon some theory of law enforcement assistance to the police

at any level since it has been determined to be unfounded in law; (2) that it cannot form the basis for any legitimate law enforcement investigation; (3) **that the use of this information by "authorized" agencies would place the subject person at a distinct disadvantage with other citizens; (4) that the use of the information would of necessity be prejudiced specifically to the rights of the subject person as compared with the right enjoyed by all other citizens; (5) and that such an unfair state of affairs is devoid of fair play, a violation of the constitutional right to privacy as well as of the presumption of innocense and is an affront to our sense of justice.**

Any citizen, even one with an absolutely clean lifetime record of not violating the law, through a series of circumstances could find himself charged with a violation of the law, even though he may be entirely innocent of the charges. Our system of criminal justice will in due course bring out the truth and he will be cleared. But, his record will not be cleared. And although he has been cleared under our laws, **at any future time the cloud of the**

> **prosecution against him will remain to all who one way or another gain access to it**: be it inquiries concerning employment, security clearance, political office or investigation concerning other criminal offenses. Id. at 79 (emphasis added).

In ***United States v. Rosen***, 343 F.Supp.804, 807 (1972), the court recognized a person's right to privacy in information, particularly if he was not subsequently convicted. The court ruled that public interest of the government in law enforcement outweighed the individual's interest to keep the information private. Id. However, the court went on to say that the right to privacy may be violated **where the information of a person not convicted was improperly published.** Id. at 809. "However, if law enforcement officials clearly abuse their discretion in the use of retained arrest records and other materials of identification, then the court might well order the return of such records or restrain such use." Id.

The Code of Federal Regulation differentiates conviction records from nonconviction records. 28 C.F.R. 20.21(b). "Limitations on dissemination. Insure that dissemination of **nonconviction** data has been limited, whether directly or through any intermediary only to: (1) Criminal justice agencies, for purposes of the administration of criminal justice and criminal justice agency employment...(2) ...by appropriate State or local officials or agencies ...(3) ...pursuant to a specific agreement with a criminal justice agency...(4)...The dissemination limitations

do not apply to conviction data." Id. [11] Troyer has never been convicted and he was no longer an applicant because he had been hired for an extended period.

Maintaining Troyer's record may have been a legitimate purpose outweighing his right to privacy. However, the defendants violated that right to privacy and equal protection of the laws when they disseminated the private facts with ill motive. As stated in ***Dooley***, *supra*, this information placed him at an extreme disadvantage as other nonconvicted citizens. Certainly, if the information did not exist, Troyer would not have been terminated.

B. The trial court should have utilized the balancing test in *Tosh*.

Plante, Fadjo and ***Tosh*** require the court to balance the privacy interest against the state interest.[12] In weighing a

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[11] La.Rev.Stat. 44:3(A)(4)(a) excludes nonconviction records as public records and prohibits their disclosure. "The records of the arrest of a person, other than the report of the officer or officers investigating the complaint, until a final judgment of conviction..." Further, La.Rev.Stat. 15:587 prohibits an employer from obtaining non-conviction information. "An employer or his representative shall be entitled to obtain **conviction** records of an applicant seeking employment directly from the Bureau of Criminal Identification and Information in order to further qualify the applicant for the position being sought..." La.Rev.Stat. 15:587(E) (emphasis added).

[12] The balancing test imposed on this court by the Fifth Circuit in ***Fadjo***, *supra*, is nearly the same as the

plaintiff's claim, "the district court must balance the invasion of privacy alleged by [plaintiff] against any legitimate state interests proven by the state." ***Fadjo v. Coon***, 633 F.2d 1172, 1176 (5th Cir. 1981). "This court noted in ***Plante***, supra, that where the privacy right is invoked to protect confidentiality, a balancing test is appropriate as opposed to the compelling state interest analysis involved when autonomy of decisionmaking is at issue. Id. *(citing* ***Plante v. Gonzales***, 575 F.2d 1119, 1134 (5th Cir. 1978).

In order to recover, the plaintiff must show that: he had a legitimate expectation of privacy in the material; and his privacy interest outweighs the public need for the disclosure. ***Slayton v. Willingham***, 726 F.2d 631, 635 (10th Cir. 1984). In the case at hand, there was absolutely no legitimate reason for the invasion of privacy and improper conversion of FBI and NCIC records.

In ***Tosh v. Buddies Supermarkets, Inc.***, the Fifth Circuit did not address the "right to privacy" of arrest records because it found that the government had a **legitimate** purpose for its conduct.

At the trial level, the defendants argue that they had a legitimate purpose for accessing Troyer's NCIC records because Boomtown was Troyer's employer. However, in the United States Supreme Court case, discussed immediately below, the Court stated that an employer has no purpose to receive NCIC records. "[T]he rights of the two press respondents in this case are no different from those that might

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Freedom of Information Act ("FOIA) implemented in ***U.S. Dept. Of Justice v. Reporters Committee for Freedom of the Press***, *supra*. Both require a balance between the privacy interest of the individual and the purpose behind the state's disclosure of the private information.

be asserted by any other third party, such as a neighbor or prospective employer." ***United States Department of Justice v. Reporters Committee for Freedom of the Press***, 489 U.S. 749, 771 (1989). Further, Louisiana law prohibits disclosure of nonconviction information to employers, even with a waiver. Further, because Troyer had already been hired and performing his job exceptionally, any pre-employment screening was irrelevant. Had the trial court utilized the balancing test, Troyer's claim would not have been dismissed. His expectation was extremely high that the twenty year old charge would be kept confidential. Further, there was no legitimate purpose.

C. The trial court erred in finding that there was no pledge of confidentiality such to invoke a constitutional right.

The Defendants, Michael Manuior, Officer Finn and Terry Richard breached their contract and positions of trust. In ***Alexander v. Peffer***, the court ruled that a defendant violates a plaintiff's Constitutional right of privacy if he commits a "flagrant bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information." 993 F.2d 1348, 1350 (8th Cir. 1993) (citing ***Davis III v. Bucher***, 853 F.2d 718 (9th Cir. 1988)).

The defendant agencies who have access to the NCIC database are required to enter into a contract, or agreement, with the Justice Department in return for access to the database. 28 C.F.R. 20. In the agreement, the law enforcement agencies agree to comply with all regulations regarding the accessing and disseminating of criminal history information. The defendants flagrantly breached this position of trust.

In ***United States v. Pedersen***, 3 F.3d 1468, 1471 (11th

Cir. 1993), the court found that the defendant officer breached his position of trust by wrongfully publicizing NCIC reports:

> In this case, the computer information accessed by Pedersen, or by officers he recruited, was highly personal and confidential. In order to maintain the integrity and privacy of the NCIC records, the FBI keeps logs detailing for which of three permissible purposes each individual's records were accessed: criminal justice, justice employment, or security clearances. Access to this information was entrusted to Pedersen in his capacity as a sworn police officer, and he was given training and instructions regarding permissible access to and dissemination of the information in order to safeguard its confidentiality. It was not error for the district court to conclude that in addition to the position of trust Pedersen occupied in society as a police officer, he was specially entrusted with maintaining the confidentiality of the information accessible through the police department computers.

In the present case, the conduct of the defendants mirrors the conduct of the defendant in ***Pedersen***. In fact, the defendant, Manuior, had a heightened position of trust

because he was, at the time of his offenses, the Supervisor of Internal Affairs for the St. Charles Parish Sheriff's Office.

ISSUE TWO RESTATED:

IF THE PRIVACY ACT DOES APPLY TO PLAINTIFFS WHO SEEK TO ENFORCE VIOLATIONS OF 42 U.S.C. § 3789g, DOES IT APPLY WHEN THE VIOLATOR IS A STATE OR LOCAL AUTHORITY.

The analysis in ***Polchowski v. Gorris***, 714 F.2d 749, 751 (7th Cir. 1983), is that the Privacy Act, 5 U.S.C. 552(a), forecloses the use of § 1983 to enforce a violation under Section 3789g. However, in ***Wright v. City of Roanoke Redevelopment Housing Authority***, 479 U.S. 416 (1987), the Supreme Court made clear that a party is only foreclosed from using § 1983 to remedy a federal statutory violation "where Congress has foreclosed such enforcement of the statute in the enactment itself." 479 U.S. at 423.

In ***Middlesex County Sewage Authority v. National Sea Clammers Ass'n***, 453 U.S. 1 (1981), the court found an intent to preclude a §1983 action because of "unusually elaborate enforcement provisions" in the statutes in question, including authority of the government to seek both civil and criminal penalties, individual rights to seek judicial review of agency action, and citizen suit provisions. 453 U.S. 1. Thus, the issue *sub judice* is whether the Privacy Act provides sufficiently comprehensive enforcement provisions to foreclose the use of 1983 to remedy violations of 3789g. In the case at bar, however, and in ***Polchowski***, no such 'elaborate enforcement provisions' exist.

Contrary to the holding in ***Polchowski***, the Ninth Circuit held in ***Keaukaha-Panaewa Community v. Hawaiian***

Homes that the statute in question, the Hawaiian Admissions Act, provided only a public remedy in that the Act expressly permitted suit only by the federal government. 739 F.2d 1467(9th Cir. 1984). The Court concluded that Congress had "not provided a comprehensive enforcement scheme which included any private administration or judicial remedy." 739 F.2d. at 1471. The Court therefore held that under the ***Nat'l Sea Clammers Ass'n*** test, the Plaintiff had a federal cause of action under §1983 of Title 42. 739 F.2d at 1471-1472.

As was the case with the Hawaiian Admissions Act in ***Keaukaha- Panaewa***, in the present case the Privacy Act would provide solutions for the federal government but not for non-federal authorities. The Privacy Act is not comprehensive enough to cover actions against state and local authorities for deprivation of the rights granted by § 3789g. Thus, the Privacy Act cannot foreclose Troyer's right to seek relief through § 1983.

Indeed, as the courts have said, § 1983 serves as a safety net to allow a party to enforce violations when no other remedy is available. In the present case, § 1983 is the 'remedial remedy' that should be available to Troyer and his search to prosecute the deprivation of the right granted unto him by the Congress at § 3789g.

Denial of Due Process and Equal Protection

Troyer maintains his position that he was denied due process under the law and equal protection of the laws. The Due Process Clause of the Fifth and Fourteenth Amendments prohibit the federal and state governments from depriving a person of life, liberty or property without "due Process of law." ***Lomax v. City of New Orleans***, 04-0461 (J. Duval) (E.D.La. July 14, 2004); 2004WL1586539. Individuals whose life, liberty and property are at stake are entitled to

"notice and opportunity to be heard." Id. To prevail under a §1983 claim, the issue becomes whether there is some conduct of the defendants which deprived the plaintiff of life, liberty or property without due process of law. Id.

In the case at bar, the plaintiff has alleged sufficient facts to sustain a cause of action for violation of due process of the law. His private facts were illegally seized and publicized causing him a direct loss of reputation, good name and employment. At no time was Troyer afforded the opportunity to protect his rights under the law.

In order to prevail on a claim against the defendants based upon a violation of the equal protection clause, it must be proved: that there are two or more classifications of similarly situated persons who were treated differently; and the classification had no rational relation to any legitimate government objective. ***Toga Society, Inc. v. Lee***, 03-2981 (J. Duval) (E.D.La. June 18, 2004); 323 F.Supp.2d 779 (citing ***Stefanoff v. Hays County, Texas,*** 154 F.3d 523,526 (5th Cir. 1998)). The Supreme Court recognizes a "class of one" where the plaintiff alleges the he has intentionally been treated differently from others similarly situated and that there is no rational basis for the difference in treatment. ***Village of Willowbrook v. Olech***, 528 U.S. 562, 564 (2000).

"The purpose of the equal protection of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Id. "To state a claim sufficient for relief, a single plaintiff must allege that an illegitimate animus or ill-will motivated by her intentional different treatment from others similarly situated and that no reasonable basis existed for such treatment." ***Shipp v. McMahon***, 234 F.3d 907, 915 (5th Cir. 12/5/00) (citing ***Olech***, *supra*).

Since its inception, courts have battled with the task of balancing a person's privacy interest against the government's authority to maintain non-conviction records. The courts have always expressed concerns that employers might gain access to non-conviction information and not hire, or terminate, a person based upon that information alone. In fact, the Supreme Court has indicated that an employer has no right to FBI maintained criminal history. ***United States Department of Justice v. Reporters Committee for Freedom of the Press***, 489 U.S. 749, 771 (1989).

In this Country, a person is innocent unless proven guilty. It follows that a person not proven guilty is innocent. To categorize innocent, but indicted, people with convicted individuals, creates an inappropriate classification in which the innocent will not be provided equal protection under the laws. "Yet it is clear that the government may not, wittingly or unwittingly, engage in wanton defamation of individuals and groups, and there is a limit beyond which the government may not tread in devising classifications that lump the innocent with the guilty." ***Menard v. Mitchell***, 430 F.2d 486, 492(D.C.App. 1970) (citing ***Watkins v. United States***, 354 U.S. 178, 187 (1967); ***Joint Anti-Fascist Refugee Committee v. McGrath***, 341 U.S. 123, 153 (1951); and ***Boorda v. Subversive Activities Control Board***, 421 F.2d 1142 (1969), cert denied, 397 U.S. 1042 (1970). "Therefore, in weighing the public interest in disclosure, we must weigh a different quantity: since innocent members may easily be separated from guilty ones, the public interest in exposure of the guilty cannot be used to justify exposure of the innocent." ***Boorda***, 421 F.2d at 1149.

V. CONCLUSION

In sum, Troyer did not plead guilty, nor was he

convicted in a public trial. More than twenty years have passed since the charges were dismissed. The wrongful publication of the private information has caused him irreparable damage. Immediately following the publication, he lost his job. Later, he was unable to find re-employment in the casino business because of the publication. He fell into a deep depression and suffered a paralyzing stroke at age 42. Private information that he was entitled to believe was in his past caused him extreme loss. With no legitimate purpose, and only because Michael Manuior was a trusted officer, was the information accessed and improperly disclosed. A great injustice has occurred.

In return for the people of this Country authorizing the maintenance of such a database, the government has given its commitment that these records will be maintained accurately and kept confidential with limited access for three legitimate purposes. If the information is readily available, why is the information kept in a database? If the information is not private, why is access so limited? If the information is worthless, why does the government spend millions of dollars gathering, collecting and storing it?

In accordance with the above discussion, the defendants violated the appellants' constitutional rights to privacy, equal protection of the laws, due process, liberty, and they breached their positions of trust in society. For the foregoing reasons, the plaintiffs-appellants, Cindy and Tate Troyer, respectfully request that this Honorable Court reverse the trial court's decisions and remand this case for further proceedings.

Respectfully submitted,
BURGOS & EVANS, L.L.C.

By:_____
ROBERT B. EVANS, III (Bar No. 23473)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-30127

TATE TROYER; CINDY TROYER,
Plaintiffs – Appellants,
Versus

BOOMTOWN LLC OF DELAWARE; LOUISIANA-GAMING APIC; GREG CHAMPAGNE, St. Charles Parish Sheriff; MICHAEL MAUNOIR; MADELINE MAUNOIR; THOMAS JONES; JOSEPH ROBERTSON;OFFICER FINN; TERRY RICHARD; PAUL D. CONNICK, JR.. in his capacity as District Attorney of Jefferson Parish
Defendants – Appellees,

Appeal from the United States District Court for the Eastern District of Louisiana (3:04-CV-1084)

Before KING, Chief Judge, and BARKSDALE and PRADO, Circuit Judges, PER CURIAM:

Essentially for the reasons stated in the district court's Minute entries entered 22 December 2004 and 13 January 2005, the judgment is

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

MINUTE ENTRY
DUVAL, J.
December 16, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TATE AND CINDY TROYER	**CIVIL ACTION**
VERSUS	**No. 04-1084**
BOOMTOWN, LLC. Et al.	**SECTION "K"(5)**

Before the Court is Defendant's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(B)(6) filed by Boomtown, L.L.C., Louisiana-I Gaming, APIC, Madeline Maunoir, Thomas Jones, and Joseph Robertson, (Boomtown employees)(Rec. Doc. No. 20). Also before this Court is a Motion to Adopt And Incorporated Memorandum In Support filed by defendants, Greg Champagne, Michael Maunoir, and Officer Finn, requesting the Court to allow them to adopt the Motion to Dismiss filed by the Boomtown employees. Oral arguments on the Motion to Dismiss were heard on September 29, 2004. The Court has reviewed the pleadings, memorandum, and the relevant law and finds as follows.

I. FACTUAL ALLEGATIONS

Plaintiffs' Civil Rights Case

Plaintiffs, Tate and Cindy Troyer, filed suit against several defendants for damages "arising out of an unlawful use and publication of private and confidential information" of Tate Troyer. (Plaintiffs' First Supplemental and Amended Complaint Doc. No. 11). Tate Troyer was an employee of Boomtown Casino from September 2002 through July 2003. During his employment, plaintiff had to "write up" employee, Madeline Maunoir, whose husband, Office Maunoir, works as a police

officer with the St. Charles Parish Sheriff's Office. (Rec. Doc. No. 11 ¶ 19, 25). After this incident, Madeline Maunoir and other Boomtown employees conspired along with Office Maunoir and Officer Finn, St. Charles Parish Deputy, to have Troyer fired. (Rec. Doc. No. 11 ¶ 24). Plaintiffs claim the conspiracy involved the officers performing an illegal and unauthorized search of Tate Troyer by running a background check via the National Crime Information Center ("NCIC"). (Rec. Doc. No. 11 ¶ 26). The NCIC report contained a record of a 1982 indictment of Tate Troyer which was dismissed in 1984; thus, no arrests or convictions exist. (Rec. Doc. No. 11 ¶ 28). After obtaining the records, Boomtown employees, Madeline Maunoir, Thomas Jones, and Joseph Robertson provided this information to Troyer's superiors. (Rec. Doc. No. ¶ 30). Thereafter, Boomtown gave Troyer the option of being fired or quitting. Troyer chose to quit, resulting in a constructive discharge. (Rec. Doc. No. 11 ¶ 29). Following the termination, Troyer suffered a stroke claimed to be related to the stress and depression he suffered from the wrongful termination. (Rec. Doc. No. 11 ¶ 33). Cindy Troyer, wife of Tate Troyer, suffered damages including loss of support from her husband, loss of affection and society, and continues to suffer stress and depression. (Rec. Doc. No. 11 ¶ 36).

Plaintiffs' complaint includes twenty-two different claims against the Boomtown defendants and defendants associated with St. Charles Parish Sheriff's Office and the Jefferson Parish District Attorney's Office. These claims include violation of Constitutional rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments, violation of 42 U.S.C. §§ 1983, 1985, 1988, conspiracy to violate Constitutional and statutory rights, violation of rights under the Louisiana Constitution, respondent superior liability, independent liability, wrongful conversion and publication of private facts, intentional infliction of emotional distress, negligence, and RICO claims.

Plaintiffs seek $5 million in damages for their federal claims, RICO claims, and state law claims.

II. STANDARD OF REVIEW

A motion to dismiss an action for failure to state a claim "'admits the facts alleged in the complaint, but challenges plaintiff's right to relief based upon those facts.'" *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir.1995)(quoting *Ward v. Hudnell*, 366 F.2d 247, 249 (5th Cir.1996)."The district court may not dismiss a complaint under rule 12(b)(6) 'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir.2000)(quoting *Conley v. Givson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2L.Ed.2d 80 (1957). "In order to avoid dismissal for failure to state a claim, however, a plaintiff must plead specific facts, not mere conclusory allegations." *Id. see also Kaiser Aluminum & Chemical Sales v. Avondale Shipyards*, 677 F.2d 1045 (5th Cir. 1982). That being said, it is well established that courts do not have to accept every allegation in the complaint as true in considering its sufficiency. Wright & Miller, *Federal Practice & Procedure* § 1357, at 311; *see also Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)(conclusory allegations and unwarranted deductions of fact are not admitted as true). Courts do not have to accept "legal conclusions," "unsupported conclusions," "unwarranted references," or "sweeping legal conclusions cast in the form of factual allegations." Wright & Miller at 315-318.

III. ANALYSIS

Plaintiffs provided no authority for a federal cause of action pursuant to the Fourth, Fifth, and Eighth Amendments of

the United States Constitution. Nor did plaintiffs provide any authority for a federal cause of action under 42 U.S.C. § 1985. *See Kush v. Rutledge*, 460 U.S. 719, S.Ct. 1483, 75 L.Ed.2d 413 (1983) for a discussion of 42 U.S.C. § 1985. The Court finds these claims are without merit under the law and facts pleaded in plaintiffs' case.

Plaintiffs allege a deprivation of their due process rights. In order to establish a claim of denial of procedural due process, they must prove that there was a constitutionally protected property or liberty interest that has been infringed by the defendant. Plaintiffs allege that their liberty interest at stake is Troyer's employment. The Court finds this claim without merit as Troyer was not a public employee. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985). *See Wallace v. Shreve Mem.Library*, 97 F.3d 746,747 (5th Cir.1996)(public employees with protected property interest in their jobs are those who may be fired only for cause and those who are permanent classified employees); *Moore v. Mississippi Valley State University*, 871 F.2d 545, 548. Plaintiffs also allege that Troyer was denied equal protection of the laws under the Equal Protection Clause. The plaintiffs have provided no authority to potentially state a federal cause of action under the Equal Protection Clause. Plaintiffs have not identified two separate classes in order for the Court to properly analyze the claim. Thus, the Court finds that plaintiffs' federal claims other than their right to privacy under the Fourteenth Amendment are without merit and, therefore, dismissed with prejudice.

As stated in the Amended Complaint, plaintiffs seek "damages arising out of violations of the civil rights of Tate Troyer resulting in his wrongful termination, loss of employment, personal injuries, pain and suffering, and other

unconstitutional policies and actions, and state law claims *arising out of an unlawful use and publication of private and confidential information.*" (emphasis added). Defendants in their Motion to Dismiss stated that while plaintiffs alleged violations of rights under the United States Constitution, the Louisiana Constitution, laws of the United States and the State of Louisiana, "all of these claims revolve around the alleged violation of Troyer's right to privacy through the improper accessing of his rap sheet." Moreover, during oral argument, the Court addressed the right to privacy in the context of the Fourteenth Amendment and a 42 U.S.C. § 1983 tort claim. Thus, the issue appropriately before the Court is whether the plaintiffs have a claim under the Fourteenth Amendment sufficient to establish a 42 U.S.C. § 1983 tort claim. In the second part of this opinion, the Court will consider plaintiffs' RICO claims against defendants.

A. Plaintiffs' Civil Rights Claims

To state a claim under section 1983, the plaintiff must allege that the defendants "deprived him of a right secured by the 'Constitution and laws' of the United States" and that they did so "under color of any statute, ordinance, regulation, custom, or usage of any State." *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. Unit B Jan.1981)(citing *United States v. Price*, 383 U.S. 787, 794, 86S.Ct. 1152, 16 L.Ed.2d 267 (1966)). Plaintiffs have alleged enough facts for the requisite state action on the part of all defendants. Acting "under color" of law does not require that the accused be an officer of the State if the accused is a willful participant in joint activity with the state or its agents. *Fadjo*, 633 F.2d at 1175 (*citing United States v. Price*, 383 U.S. at 794).

The question then becomes whether there is a deprivation of a constitutional right. *Fadjo*, 633 at 1175. As

stated in their complaint, plaintiffs' claims are based upon the alleged "unlawful use and publication of private and confidential information" which implicates the Fourteenth Amendment's protection of the "individual interest in avoiding disclosure of personal matters" as described in the Supreme Court decision *Whalen v. Roe*, 429 U.S. 589, 599, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). In *Whalen*, the Supreme Court separated the right to privacy into two separate strands: "[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." *Id.* This case involved a New York statute which required that prescriptions for certain dangerous drugs be prepared on official forms to be sent to the state health department. *Id.* at 592-94. A group of patients who were being treated with drugs covered by the New York statute challenged the act as a violation of their constitutional right to privacy because it required disclosure of the patient's name, address, age, drug and dosage, and prescribing physician. *Id.* The Supreme Court held that this record of information did not "establish an invasion of any right or liberty protected by the Fourteenth Amendment." *Id.* at 606. This Court will focus on the first strand of privacy as established in *Whalen* to determine whether the dissemination of plaintiff's rap sheet revealing a 1982 indictment that was dismissed two years later constitutes "an invasion of any right or liberty protected by the Fourteenth Amendment."

Plaintiffs rely upon the Fifth Circuit case in *Tosh v. Buddies Supermarket, Inc.*, 482 F.2d 329 (5th Cir. 1973). In *Tosh*, plaintiffs, union organizers, sought relief under Section 1983 because a detective of the police department provided rap sheets to the security personnel of Buddies supermarket who disseminated this information to the public. *Id.* at 330. The

Court held that the "records" released to the store personnel was "devoid of any evidence" to support that plaintiffs were deprived of constitutional rights. *Id.* at 332. Three years later, the United States Supreme Court decided *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). In this case, plaintiff brought a 1983 claim under the Fourteenth Amendment because two police officers distributed to local merchants fliers containing mug shot photos and naming them as active shoplifters. *Id.* at 695. The plaintiff had been arrested on a charge of shoplifting when his name and mug shot were disclosed; shortly after the circulation of the flyer, the charge was dismissed. *Id.* The Court held that publicizing "a record of an official act such as an arrest" was not recognized by any of their substantive privacy decisions. *Id.* at 713.

The Fifth Circuit recently discussed the second branch of privacy established in *Whalen* in *Zuffuto v. City of Hammond*, 308 F.3d 485 (5th Cir.2002). This case is instructive in terms of its analytical framework and the clear limits placed upon claims of this nature. In *Zuffuto*, police officer Zuffuto placed a call from his private office to his wife expressing his approval of a department re-structuring adversely affecting his superiors. *Id.* at 487. The conversation was surreptitiously taped and was played for two police officers. *Id.* Subsequently, Zaffuto was listed as a witness in a co-worker's sex discrimination lawsuit and was suspended 240 hours for allegedly failing to accurately report an officer assault. *Id.* Among other complaints, Zaffuto filed a 1983 action, claiming that his right to privacy under the Fourteenth Amendment was violated. *Id.* at 489.

The Fifth Circuit held that "the disclosure in this case, though deliberate, did not reveal the type of intimate facts to constitute a constitutional violation." *Id.* at 490. The Fifth Circuit has never explicitly determined what types of disclosures

are "'personal' enough to create a constitutional cause of action," but turned to other courts that "have clearly been limiting the scope of confidentiality branch actions." *Id.* The Court discussed *Davis III v. Bucher,* 853 F.2d 718, 720 (9th Cir.1988) in which a corrections officer showed nude photos of an inmate's wife to at least two other inmates. *Zaffuto*, 308 F.3d at 490. The Fifth Circuit, citing *Davis III*, stated the following: "The court said that the case presented 'two isolated instances of poor judgment' and that 'elevating them to constitutional dimension would tend to trivialize the Fourteenth Amendment by making it a magnet for all claims involving personal information, state officers, and unfortunate indignities.'" *Id.* The Court noted further that "'[t]he constitutional right to privacy is generally limited to only the most intimate aspects of human affairs.'" *Id.* (*citing Wade v. Goodwin*, 843 F.2d 1150, 1153 (8th Cir.1988). The Court concluded that the "substance" of the Zaffuto's conversation revealed only that "Zaffuto disliked some of his bosses," and "[t]he disclosure in this case, though deliberate, did not reveal the type of intimate facts to constitute a constitutional violation." *Zaffuto,* 308 F.3d at 490-491.

In *Cline v. Rogers*, 87 F.3d 176 (6th Cir.1996), cert. denied, 519 U.S.1008, 117 S.Ct.510, 136 L.Ed.2d 400(1996), the Sixth Circuit considered a 1983 claim for improper disclosure of arrest records. Plaintiff alleged that a private citizen obtained his arrest record from the sheriff's department via the NCIC database and that he had been deprived of his constitutional right to privacy. *Id.* at 178. The Court stated, "there is no violation of the United States Constitution in this case because there is no constitutional right to privacy in one's criminal record." *Id.* at 179. The Court cited *Paul v. Davis* in proposing that one's criminal history is arguably "not a private 'personal matter' at all, since arrest and conviction information

are matters of public record. *Id.* The following cases involve disclosure of criminal convictions in which the courts held there was no constitutional right to privacy and no 1983 claim: *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir.1995)("[G]overnment disclosures of arrest records and information contained in police reports do not implicate the right to privacy(citations omitted). An expungement order does not privatize criminal activity."); *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir.1996)("Far from being 'inherently private,' the details of Eagle's prior guilty plea are by their very nature matters within the public domain. Accordingly, we decide without hesitation that Eagle has no legitimate expectation of privacy in this material."); *Reich v. Town of Middletown*, 311 F.3d 83, 85 (1st Cir.2002)(holding that there is no right to privacy under plaintiff's state law claims when police officers released child abuse arrest report to school principal; federal law claims which had since been not appealed). The holdings of these cases grant this Court little room to find a constitutional right to privacy in Tate Troyer's situation when the substance of the rap sheet, a 1982 indictment, concern a public matter. Morever, the defendants' counsel on the day of oral argument produced a copy of the indictment which was obtained in the Clerk of Court's office that morning at the Eastern District of Louisiana.

Plaintiffs argue that there is a substantial right to privacy in the disclosure of rap sheets based upon the U.S. Supreme Court's decision in *United States Department of Justice v. Reporters Committee For Freedom Of The Press*, 489 U.S. 749, 109 S.Ct.1468, 103 L.Ed.2d 774 (1989) which held that a third party's request for law enforcement records concerning a private citizen can reasonably be expected to invade the citizen's privacy within the context of 5 U.S.C.A. § 552(b)(7)(C) of the Freedom of Information Act. The case clearly states that the privacy

interest in a person's rap sheet will always be high. *Id.* at 780. However, the Supreme Court noted that the meaning of privacy under the FOIA is not applicable to claims brought under Section 1983. "[t]he question of the statutory meaning of privacy under the FOIA is, of course, not the same as the question whether a tort action might lie for invasion of privacy or the question whether an individual's interest in privacy is protected by the Constitution." *Id.* at 1476 n.13. It is also significant that following this statement, the Supreme Court cited *Paul v. Davis* "(no constitutional privacy right affected by publication of name of arrested but untried shoplifter)." *Id.*

Thus, based on the cases discussed above, the 1982 indictment, regardless of the time that has elapsed since its dismissal, does not contain information that includes the "most intimate aspects of human affairs" or "intimate facts to constitute a constitutional violation." *Fadjo*, 633 F.2d at 1176-491. Nor does the indictment contain a "pledge of confidentiality."[3] As the *Davis III* case noted and the Fifth

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[3] The Court is referring to the Fifth Circuit's decision in *Fadjo v. Coon*, 633 F.2d 1172, 1174 (5th Cir. Unit B Jan.1981). In this case, plaintiff brought a 1983 claim based on his constitutional right to privacy. *Id.* The state of Florida, as part of an investigation, used its subpoena power, under a pledge of confidentiality, to obtain information from the plaintiff concerning "the most private details of his life." *Id.* This information did not remain confidential, as it was passed onto insurance companies. *Id.* The Court held that this case is distinguishable from *Paul v. Davis*, *supra*, "since it involves the revelation of intimate information obtained under a pledge of confidentiality." *Id.* at 1176. This case is distinguishable from

Circuit cited, a tort action under the Fourteenth Amendment does not cover those claims that involve "personal information," "state officers" and "unfortunate indignities." *Id.* at 490.

Plaintiffs urge this Court to apply the balancing test weighing the invasion of privacy against the legitimate purpose in disclosing the information as employed by the Fifth Circuit in *Fadjo v. Bundles*, 482 F.2d at 332 and other cases in the Fifth Circuit. The Court notes that *Zaffuto* analyzed this strand of privacy in the context of a 1983 claim without a balancing test. 308 F.3d 485, 489-491(5th Cir.2002). In *Cinel v. Connick*, 15 F.3d 1338, 1342-1343 (5th Cir.1994), cert. denied, 513 U.S.868, 115 S.Ct.189, 130 L.Ed.2d 122 (1994), the Fifth Circuit used the balancing test on one Fourteenth Amendment privacy claim involving one set of facts, but not on another. The plaintiff claimed an infringement of his right to privacy when the names and addresses of the men depicted in a sexual video with him were released by an investigator for the DA's office. *Id.* at 1340. The Court stated, "[t]he release of this information alone does not involve intimate details . . . thus, these facts . . . are insufficient to state a claim for a deprivation of his constitutional right to privacy." *Id.* at 1342. However, when the Court considered the disclosure of sexually oriented materials found in the plaintiff's room, the Court considered the government's interest. *Id.* The Fifth Circuit in *Cinel* and *Zaffuto* declined to engage in the balancing test when the alleged invasion did not meet the constitutional threshold. This Court finds that the alleged invasion here does meet the constitutional threshold of a

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the facts in *Trover*. There was no pledge of confidentiality and an indictment does not involve "the most private details" of plaintiff's life.

under the Fourteenth Amendment; therefore, f fundamental rights to balance.

asons stated above, the Court dismisses all deral laws and the United States Constitution laintiffs also raise a claim under 42 U.S.C. § vs the recovery of attorney's fees; having claims, this statute is not applicable.

RICO Claims

ase Statement

llege violations of 18 U.S.C.A 1962(a)(b)(c) omtown Casino, Madeline Maunoir, Joseph m Jones and possibly others. Plaintiffs allege nts engaged in a pattern of illegal conduct nployees to illegally access the NCIC database c. Doc. No. 11 ¶ 101). Plaintiffs allege that llegally retrieved criminal background reports ough the NCIC, and sold information for s and entities, including, but not limited to

enacted ... RICO ... for the purpose of lication of organized crime in the United *Prupis*, 529 U.S. 494, 496 (2000)(internal tions omitted). RICO has eight sections, four ctly to the case before this Court. 18 U.S.C. § th the four activities prohibited by the statute. b), and ©) were designed to work together to e different ways in which organized crime pts legitimate organizations." David B. Smith ed, *Civil RICO*, § 5.02, p. 5- 2 (Matthew

Bender & Co.2000). Subsection (d) is an inchoate offense, prohibiting conspiracy to violate sections (a), (b), or ©). Plaintiffs allege violations of Section 1962(a)-(d).

"Common elements are present in all four [RICO] subsections." *Crowe v. Henry*, 43 F.3d 198, 204 (5th Cir.1995). "These common elements teach that any RICO claim necessitates "(1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct or control of an enterprise." *Id.* (*citing Delta Truck & Tractor, Inc.* v. *J.L.Chase Co.*, 855 F.2d 241, 241 (5th Cir.1998)); *see also* Keith A. Langley & Mark Chevallier, Civil RICO, 21 Tex.Tech. L.Rev.185 (1990). Once those fundamental prerequisites are satisfied, the court "may then continue to the substantive requirements of each respective subsection." *St. Paul Mercury Insurance Co. v. Willimson*, 224 F.3d 425, 439 (5th Cir.2000).

A RICO person is the defendant. *Crowe*, 43 F.3d at 204. 18 U.S.C. § 1961(3) defines a RICO person as "any individual or entity capable of holding a legal or beneficial interest in property." Recognizing that the statute provides a very broad definition, the Fifth Circuit has clarified the definition, requiring that "the RICO person must be one that either poses or has posed a continuous threat of engaging in the acts of racketeering." *Crowe*, 43 F.3d at 204(*quoting Delta Truck & Tractor*,855 F.2d at 242. The panel in *Crowe* expounded upon the requirement by stating that "[t]he continuous threat requirement may not be satisfied if no more is pled than that the person has engaged in a limited number of predicate racketeering acts." *Id.* In Plaintiffs' Opposition, they state that defendants, Thomas Jones, Joseph Robertson, Does 1-3, and Madeline Maunoir (all Boomtown employees) are the RICO persons. In their RICO Case Statement, plaintiffs alleged that on April 25, 2003 and on May 16, 2003 police officers at St. Charles Parish Sheriff's Office performed NCIC searches on Troyer. Plaintiffs also alleged that

on June 26, 2003 and August 6, 2003, police officers searched records for another Boomtown employer, Troyer's successor. Plaintiffs name the Boomtown employees as the RICO person, but use the acts of the police officers to establish a "continuous threat." Furthermore, performing a search on two separate persons only shows a limited number of "predicate acts." Thus, based on this sparse evidence, the Court finds there is no RICO person who poses a "continuous threat."

The final element common to all RICO claims is the existence of an enterprise. Thus, "[a] plaintiff asserting a RICO claim must allege the existence of an enterprise." *Crowe*, 43 F.3d at 204. A RICO enterprise is "a group of persons associated together for a common purpose" and "is proved by evidence of an ongoing organization and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). The statute defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Thus, a RICO enterprise can either be a legal entity or an association in fact. *St. Paul Mercury Insurance Co.*, 224 F.3d at 439; *Manax v. McNamara*, 842 F.2d 808,811(5th Cir.1988). "While a RICO enterprise can be formal or informal, some type of organizational structure is required." *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 675 (7th Cir.2000). The Fifth Circuit has determined that an "association in fact" "enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization, and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure." *Crowe*, 43 F.3d at 205.

Plaintiffs claim that an "association in fact" enterprise exists. Plaintiffs state that the officers at St. Charles Parish Sheriff's Office and certain employees at Boomtown Casino

comprised the RICO enterprise. Plaintiffs state that the "enterprise is two fold." Plaintiffs allege that Officers Maunoir, Finn, and Richard provided illegal information to Boomtown employees for profit and Boomtown Casino, through certain employees, profited from the illegal enterprise and gained an unfair advantage over employees and other casinos by soliciting the illegally obtained information.

Upon reviewing plaintiffs' description of the enterprise in the RICO Statement, the Court finds that the plaintiffs fail to satisfy even the first element required for an "association in fact"–an existence separate and apart from the pattern of racketeering. The question of whether the enterprise has a "separate existence" from the pattern of activity through which it is conducted ought to be the focus of inquiry in every illegitimate enterprise case." David B. Smith & Terrance G. Reed, *Civil RICO*, § 3.06, p. 3-50 (Matthew Bender & Co.2000). The United States Supreme Court has instructed that "[t]he "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages." *Turkette*, 452 U.S. at 583; *see also Elliot v. Foufas*, 867 F.2d 877, 881 (5th Cir.1989). Therefore, proof of a pattern of racketeering does not necessarily prove the existence of an enterprise, and vice versa. *Id.* Moreover, "the plaintiff must plead specific facts which establish that the association exists for purposes other than simply to commit the predicate acts." *Id.* If the association has as its *raison d'etre* a single, discrete goal toward which all its energies are directed, the association is not a RICO enterprise." *Household Bank FSB v. Metro Associates*, 1992 WL 350239 (E.D.La.1992). Plaintiffs do not provide any evidence that the enterprise exists for purposes other than to commit the alleged acts. It appears that the alleged single goal in mind of this "two fold enterprise" is the production of NCIC reports for a gainful advantage over other employees in the casino business. The plaintiffs fail to establish that this

enterprise made up of Boomtown Casino employees and officers at St. Charles Parish is an entity separate and apart from the pattern of illegal activity. Because the first element of an "association in fact" enterprise is not satisfied, the Court finds that there is no enterprise.

The Court need not investigate the validity of the alleged predicate acts because plaintiffs fail to meet two of the three elements common to all RICO claims. The Court finds that there are no RICO person and no established enterprise. Thus, plaintiffs' RICO claims are dismissed with prejudice.

The Court notes that there are federal claims pending against Terry Richard and Paul Connick. Therefore, any dismissal of state claims would be premature. Accordingly,

IT IS ORDERED that the defendants Greg Champagne, Michael Maunoir, and Officer Finn's Motion To Adopt And Incorporated Memorandum In Support is **GRANTED**.

IT IS FURTHER ORDERED that plaintiffs' federal law claims are **DISMISSED WITH PREJUDICE** against defendants Boomtown L.L.C., Louisiana I-Gaming, APIC, Madeline Maunoir, Thomas Jones, Joseph Robertson, Greg Champagne, Michael Maunoir, and Officer Finn.

IT IS FURTHER ORDERED that plaintiffs' RICO claims are **DISMISSED WITH PREJUDICE** against defendants Boomtown Casino L.L.C., Louisiana I-Gaming, APIC, Madeline Maunoir, Thomas Jones, and Joseph Robertson.

MINUTE ENTRY
DUVAL, J.
January 12, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TATE TROYER, ET AL.	**CIVIL ACTION**
VERSUS	**No. 04-1084**
BOOMTOWN, LLC., ET. AL	**SECTION "K"(5)**

Before the Court is defendants, Jefferson Parish District Attorney Paul Connick and Terry Richard's Motion To Dismiss And Incorporated Memorandum In Support (Rec.Doc.32) and Plaintiffs' Memorandum In Opposition To Paul Connick And Terry Richards's 12(b)(6) Motion to Dismiss (Rec.Doc. 33). For the reasons stated below, the Court grants defendants' motion.

I. BACKGROUND

Plaintiffs, Tate and Cindy Troyer, filed suit against several defendants for damages "arising out of an unlawful use and publication of private and confidential information" of Tate Troyer. (Plaintiffs' First Supplemental and Amended Complaint Doc. No. 11). Tate Troyer was an employee of Boomtown Casino from September 2002 through July 2003. During his employment, plaintiff had to "write up" employee, Madeline Maunoir, whose husband, Office Maunoir, works as a police officer with the St. Charles Parish Sheriff's Office. (Rec. Doc. No. 11 ¶ 19, 25). After this incident, Madeline Maunoir and

other Boomtown employees conspired along with Office Maunoir and Officer Finn, St. Charles Parish Deputy, to have Troyer fired. (Rec. Doc. No. 11 ¶ 24). Plaintiffs claim the conspiracy involved the officers performing an illegal and unauthorized search of Tate Troyer by running a background check via the National Crime Information Center ("NCIC"). (Rec. Doc. No. 11 ¶ 26). The NCIC report contained a record of a 1982 indictment of Tate Troyer which was dismissed in 1984; thus, no arrests or convictions exist. (Rec. Doc. No. 11 ¶ 28). After obtaining the records, Boomtown employees, Madeline Maunoir, Thomas Jones, and Joseph Robertson provided this information to Troyer's superiors. (Rec. Doc. No. ¶ 30). Thereafter, Boomtown gave Troyer the option of being fired or quitting. Troyer chose to quit, resulting in a constructive discharge. (Rec. Doc. No. 11 ¶ 29). Following the termination, Troyer suffered a stroke claimed to be related to the stress and depression he suffered from the wrongful termination. (Rec. Doc. No. 11 ¶ 33). Cindy Troyer, wife of Tate Troyer, suffered damages including loss of support from her husband, loss of affection and society, and continues to suffer stress and depression. (Rec. Doc. No. 11 ¶ 36).

Plaintiffs' complaint includes twenty-two different claims against the Boomtown defendants, police officers Maunoir, Finn, and Sheriff Champagne, and defendants Paul Connick and Terry Richard with the Jefferson Parish District Attorney's Office. Plaintiffs seek $5 million in damages for their federal claims, RICO claims, and state law claims. RICO claims were not brought against defendants Paul Connick and Terry Richard.

II. LEGAL STANDARD

A motion to dismiss an action for failure to state a claim "'admits the facts alleged in the complaint, but challenges plaintiff's right to relief based upon those facts.'" *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir.1995)(quoting *Ward v. Hudnell*, 366 F.2d 247, 249 (5th Cir.1996)."The district court may not dismiss a complaint under rule 12(b)(6) 'unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir.2000)(quoting *Conley v. Givson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2L.Ed.2d 80 (1957). "In order to avoid dismissal for failure to state a claim, however, a plaintiff must plead specific facts, not mere conclusory allegations." *Id. see also Kaiser Aluminum & Chemical Sales v. Avondale Shipyards*, 677 F.2d 1045 (5th Cir. 1982). That being said, it is well established that courts do not have to accept every allegation in the complaint as true in considering its sufficiency. Wright & Miller, *Federal Practice & Procedure* § 1357, at 311; *see also Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)(conclusory allegations and unwarranted deductions of fact are not admitted as true). Courts do not have to accept "legal conclusions," "unsupported conclusions," "unwarranted references," or "sweeping legal conclusions cast in the form of factual allegations." Wright & Miller at 315-318.

III. ANALYSIS

On December 22, 2004, the Court dismissed plaintiffs' claims against defendants Boomtown LLC, Louisiana-I Gaming, APIC, Madeline Maunoir, Thomas Jones and Joseph Robertson for failure to state a cause of action (Rec.Doc.30). Except for the RICO claims, plaintiffs allege the identical claims that were previously dismissed by the Court against defendants herein.

Plaintiffs oppose the instant matter on the same grounds as those set forth in their Memorandum in Opposition to Boomtown's Motion to Dismiss. Thus, for the reasons stated in the Court's Minute Entry (Rec.Doc.30) dated December 22, 2004, the Court dismisses plaintiffs' federal claims against defendants Paul Connick and Terry Richard with prejudice.

IV. PENDING STATE LAW CLAIMS

Movers in the instant motion were the only two remaining defendants in these proceedings who had pending federal law claims against them. Thus, this Court's finding that plaintiffs have no viable claims under federal law against all named defendants deprives this Court of the foundation for its subject matter jurisdiction. Although the several state law counts were properly asserted pursuant to 28 U.S.C. § 1367, the the Court must decide whether to retain those causes of action pursuant to its pendent jurisdiction. Pendent jurisdiction is a "doctrine of discretion, not of plaintiff's right." *Carnegie-Mellon University v. Cohill*, 484 U.S.343, 350 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988)(*quoting Mine Workers v. Gibbs*, 383 U.S.715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966)). Although there are several factors to consider in making this determination, the Court has instructed that "when the federal claims have dropped out of the lawsuit in its early stages and only state law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Id.; See also Parker & Parsley Petroleum Co. v. Dresser Industries*, 972 F.2d 580 (5th Cir.1992)(general rule is to dismiss pendent state claims after federal claims dismissed); *Rhyne v. Henderson County*, 973 F.2d 386,395 (5th Cir.1992)(district court properly dismissed state claims after dismissal of federal questions); *Rahr v. Grant Thornton LLP*, 142 F.Supp.2d 793 (N.D.Tex.2000)(same).

Thus, federal courts should avoid deciding needless decisions of state law. *Noble v. White*, 996 F.2d 797 (5th Cir.1993)(citing Mine Workers, 383 U.S. 715)). Here, the federal claims have been dismissed at an early stage of the litigation. As of this date, there has been no trial date set in this matter. Furthermore, state law claims remain, some of which involve the Louisiana State Constitution. Based on these factors, judicial economy, convenience, fairness and comity require this Court to dismiss the pendent state law claims as well. Accordingly,

IT IS ORDERED that defendants, Jefferson Parish District Attorney Paul Connick and Terry Richard's Motion To Dismiss And Incorporated Memorandum In Support (Rec.Doc.32) is **HEREBY GRANTED**; thus, federal claims against defendants are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that state law claims existing against all defendants in the lawsuit are **DISMISSED WITHOUT PREJUDICE**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TATE TROYER, ET AL.	**CIVIL ACTION**
VERSUS	**No. 04-1084**
BOOMTOWN, LLC., ET. AL	**SECTION "K"(5)**

JUDGMENT

Considering the Court's Minute Entries dated December 22, 2004 (Rec.Doc.30) and January 12, 2005,

IT IS ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of defendants Boomtown, L.L.C. Louisiana-1Gaming, APIC, Greg Champagne, Michael Maunoir, Officer Finn, Madeline Maunoir, Thomas Jones, Joseph Robertson, Terry Richard, Paul Connick dismissing plaintiffs' federal law claims with prejudice and dismissing plaintiffs' stat law claims without prejudice with each party to bear its/his own costs.

New Orleans, Louisiana, this **12TH** day of January, 2005.

/s/
STANWOOD R. DUVAL, JR.
UNITED STATES DISTRICT JUDGE